IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 581/2004

(1) M/s. Amison Fisheries Limited, a Company registered under the provisions of the Indian Companies Act, 1956 (Act of 1956), through its Managing Director, Shri R. Ashok, having its registered Office at Amison House, Rameshwar Lane, Kochi, Kerala 682005.

(2) Shri R. Ashok, resident of 5/G2, Kamat Complex, Tonca, Caranzalem-Goa 403 002. ..... Petitioners.

V/s.

(1)Corporation Bank, Panaji Branch, having Office at Dr. A. Borkar Road, Opposite Municipal Garden, P.B. No.87, Panaji, Goa.

(2)The Chief Manager, Corporation Bank, Panaji Branch, having Office at Dr. A. Borkar Road, Opposite Municipal Garden, P.B. No.87, Panaji, Goa. ..... Respondents.

Mr. M.S. Sonak, Advocate for the petitioners.

Mr. G. Tamba, Advocate for the corespondents.

CORAM : B.H. MARLAPALLE &
N.A. BRITTO, JJ.

DATE : DECEMBER 22, 2004.

ORAL ORDER : (Per MARLAPALLE, J.)

We have Mr. Sonak, the learned Counsel for the petitioners. Petitioner No.1 is the borrower and petitioner No.2 is the guarantor. Respondent No.1 Bank, through its Branch at Panaji is impleaded as respondent No.2. The respondents have issued notice dated 9.10.2004 under Section 13(2), read with Section 13(3) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. This notice has been challenged in the instant petition filed under Article 226 of the Constitution.

2. As per the notice impugned, the period of 60 days was given to the addressees to clear the accumulated dues, amounting to Rs.272,88,690/-, with interest at the rate of 18 % per annum, compounded with quarterly rests, failing which the secured creditor i.e. the Bank shall be entitled to exercise all or any of the rights under Section 13(4) of the said Act. This notice was addressed to six parties, the first one being the borrower Company and the others, perhaps, being the Directors/Guarantors and it seeks to take over the property of the petitioner No.2 which he mortgaged as guarantor to the loan advanced to petitioner No.1. The particulars of this property are : (1) Office No.T-5A, Cardozo Building, 3rd Floor, Patto, Panaji,

Goa, and (2) Flat No.G-2, Ground Floor, Building No.5, “Kamat Complex” St.Inez, Panaji, Goa. The grievance raised in this petition is only to the extent of this property and not the property of other guarantors/borrower.

3. We have noted that the petitioners did not file reply till the period of 60 days expired and the reply filed was dated 13.12.2004. The only legal issue raised in the said reply is regarding the pendency of the appeal before the appellate Authority (AIFR, Delhi), under the Sick Industrial Companies (Special Provisions) Act, 1985. Mr. Sonak has placed before us today the reply received to the said representation dated 13.12.2004 and the Bank has rejected the contentions raised in the said representation.

Mr. Sonak, the learned Counsel has raised the following three points in challenging the notice dated 9.10.2004 :

(a) As per the amendment to the provisions of Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, referred to as , “the Securitisation Act”), by the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Ordinance, 2004, which Oridnance

has been brought into force w.e.f. 11.11.2004, sub-section (3A) has been added in the scheme of Section 13 and simultaneously Section 17 regarding right to appeal has also been amended and, therefore, unless the provisions of sub-section (3A) of Section 13 were followed, the Bank had no power to issue a notice under Section 13(2) of Section 13(3) of the Securitisation Act;

(b) Petitioner No.1 had approached the Board for Industrial and Financial Reconstruction under Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 and its application having been rejected on 15.9.2004, an appeal under Section 25 of the said Act has been filed before the appellate Authority and the next hearing is fixed on 11.1.2005. Under such circumstances, the provisions of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 would apply;

( c) Even under the Securitisation Act, simultaneous proceedings for recovery as well as taking over the property by invoking the provisions of Section 13(2) and 13(3) of the Securitisation Act are not permissible to be invoked.

Mr. Sonak, in support of these submissions, placed reliance on the following decisions: **Maharashtra Tubes Ltd. v. State Industrial & Investment Corporation of Maharashtra Ltd., and anr.** (1993) SCC 144; A.P. **State Financial Corporation v. M/s. Gar Re-Rolling Mills and anr.,** (1994) 2 SCC 647; and **Patheja Bros. Forgings & Stamping and anr. v. ICICI Ltd. and ors.** (200) 6 SCC 545.

4. By the petitioners' own contentions, as on the date the impugned notice was issued i.e. 9.10.2004, it did not suffer from any infirmity on the first point which is raised on the basis of the ordinance which has been brought into force with effect from 11.11.2004. Even after the said ordinance came into effect, the petitioners did not point out in their representation that the notice could not have been issued or that it had become illegal on account of the ordinance after 11.11.2004. The amended provision clearly states that the Bank has to make an application to the Debt Recovery Tribunal before which the proceedings for recovery are pending and such an application may be allowed or rejected, after hearing the parties, which clearly implies that all the legal grounds that may be raised by either of the parties in respect of their respective cases are required to be considered by the Tribunal before allowing the Bank

to proceed with the remedy available under Section 13(2), read with Section 13(3) of the Securitisation Act. If the said position in law, as changed from 11.11.2004, was brought to the notice of the Bank, it could have considered the same and taken appropriate legal steps. Even now the Bank is not precluded from correcting its own actions, so as to comply with the provisions of law. The remaining two issues raised by Mr Sonak could be considered, on an application being submitted by the Bank under Section 13(3A) of the Securitisation Act, by the Debt Recovery Tribunal and we need not dwell upon these legal submissions.

5. At the same time, during the pendency of the application to be moved by the Bank, equity demands that the interests of both the parties are protected. Mr. Sonak submitted that if the residential flat of petitioner No.2 is taken over, the entire family would be on the streets and would thus suffer irreparable harm. It would, therefore, be in the interest of justice that the impugned notice is allowed to operate only to the extent of symbolic taking over of the possession of the two properties belonging to petitioner No.2 and without disturbing the petitioners' family till the application moved by the Bank is decided by the Debt Recovery Tribunal, as per law.

6. We, therefore, dispose of this petition with liberty to the

Bank to approach the Debt Recovery Tribunal with an application under Section 13(3A) of the Securitisation Act and such an application shall be moved within two weeks from today. The impugned notice would operate only for taking over symbolically the possession of the property of the petitioner No.2 as set out therein and the Bank is, hereby, restrained from taking any further steps under Section 13(10) of the Securitisation Act, until the application to be filed, is decided by the Debt Recovery Tribunal, as per law.

B.H. MARLAPALLE, J.

N.A. BRITTO, J.

ssm.